

IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 09-0322

PLAINS GRAINS LIMITED PARTNERSHIP,)
a Montana limited partnership;)
PLAINS GRAINS INC., a Montana corporation;)
ROBERT E. LASSILA and EARLYNE A.)
LASSILA; KEVIN D. LASSILA and)
STEFFANI J. LASSILA; KERRY ANN)
(LASSILA) FRASER; DARYL E. LASSILA)
and LINDA K. LASSILA; DOROTHY LASSILA;)
DAN LASSILA; NANCY LASSILA)
BIRTWISTLE; CHRISTOPHER LASSILA;)
JOSEPH W. KANTOLA and MYRNA R.)
KANTOLA; KENT HOLTZ; HOTLZ FARMS,)
INC., a Montana corporation; MEADOWLARK)
FARMS, a Montana partnership; JON C.)
KANTOROWICZ and CHARLOTTE)
KANTOROWICZ; JAMES FELDMAN and)
COURTNEY FELDMAN; DAVID P. ROEHM)
and CLAIRE M. ROEHM; DENNIS N. WARD)
and LaLONNIE WARD; JANNY KINION-MAY;)
C LAZY J RANCH; CHARLES BUMGARNER)
and KARLA BUMGARNER; CARL W.)
MEHMKE and MARTHA MEHMKE; WALTER)
MEHMKE and ROBIN MEHMKE; LOUISIANA)
LAND & LIVESTOCK, LLC., a limited liability)
corporation; GWIN FAMILY TRUST,)
U/A DATED SEPTEMBER 20, 1991;)
FORDER LAND & CATTLE CO.; WAYNE W.)
FORDER and DOROTHY FORDER;)
CONN FORDER and JEANINE FORDER;)
ROBERT E. VIHINEN and PENNIE VIHINEN;)
VIOLET VIHINEN; ROBERT E. VIHINEN,)
TRUSTEE OF ELMER VIHINEN TRUST;)
JAYBE D. FLOYD and MICHAEL E. LUCKETT,)
TRUSTEES OF THE JAYBE D. FLOYD LIVING)
TRUST; ROBERT M. COLEMAN and HELEN)
A. COLEMAN; GARY OWEN and KAY OWEN;)
RICHARD W. DOHRMAN and ADELE B.)
DOHRMAN; CHARLES CHRISTENSEN)
and YULIYA CHRISTENSEN; WALKER)
S. SMITH, JR. and TAMMIE LYNNE SMITH;)
MICHAEL E. HOY; JEROME R. THILL; and)

FILED

SEP 17 2009

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

ORIGINAL

MONTANA ENVIRONMENTAL)
INFORMATION CENTER, a Montana)
nonprofit public benefit corporation,)
)
Appellants,)
)
vs.)
)
BOARD OF COUNTY COMMISSIONERS OF)
CASCADE COUNTY, the governing body of)
the County of Cascade, acting by and through)
Peggy S. Beltrone, Lance Olson and)
Joe Briggs,)
)
Appellees,)
)
and)
)
SOUTHERN MONTANA ELECTRIC)
GENERATION and TRANSMISSION)
COOPERATIVE, INC.; the ESTATE OF)
DUANE L URQUHART; MARY URQUHART;)
SCOTT URQUHART; and LINDA URQUHART,)
)
Appellees/Cross-Appellants.)

On appeal from the Montana Eighth Judicial District Court
Cause No. BDV-08-480
Honorable E. Wayne Phillips Presiding

OBJECTION OF APPELLEES/CROSS-APPELLANTS SOUTHERN MONTANA ELECTRIC GENERATION AND TRANSMISSION COOPERATIVE, INC. AND URQUHARTS TO NORTHERN PLAINS RESOURCE COUNCIL, INC., TROUT UNLIMITED, INC., NATIONAL WILDLIFE FEDERATION, MONTANA AUDUBON, THE SIERRA CLUB, CITIZENS FOR CLEAN ENERGY, CITIZENS FOR A BETTER FLATHEAD, KILA-SMITH LAKE COMMUNITY DEVELOPMENT COALITION, INC., GREATER YELLOWSTONE COALITION, MONTANANS AGAINST TOXIC BURNING, AND BITTERROOTERS FOR PLANNING MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

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Attorneys for Appellees/Cross- Appellants SME/Urquharts

Attorneys for Amici Curiae

OBJECTION TO REQUEST FOR LEAVE TO FILE AMICI BRIEF

Appelles/Cross-Appellants Southern Montana and the Urquharts object to the Motion for Leave to File *Amici Curiae* briefs, in opposition to Southern Montana's Motion to Dismiss Appeal on Grounds of Mootness. This second Motion for leave to appear *amici* was filed on behalf of a diverse group of **eleven** applicants, which seek permission to file an *amicus curiae* brief on a constitutional issue which is not before the Court. The Motion should be denied for this and numerous other reasons, discussed below.

1. The Constitutional Issue Which Amici Seek to Address Was Not Raised Below.

Amici seek to submit a brief on what they perceive to be a restriction of their constitutional right of access to the courts as a result of the requirement under § 27-19-306, M.C.A., which conditions an injunction or stay upon filing a written undertaking. It is undisputed that Appellants Plains Grains, assisted by the Montana Environmental Information Center ("MEIC") (which is an Appellant in this litigation) and Earth Justice in multiple suits against Southern Montana over rezoning and air quality permits, never moved for an injunction or stay at any time below. Therefore, the District Court was never called upon to consider § 27-19-306, M.C.A., and the request for a bond.

Since Plains Grains never requested a stay, no constitutional challenge based upon right of access to the courts was presented to the district court. A *party* may not raise an issue for the first time on appeal. *Unified Industries, Inc. v. Easley*, 1998 MT 145, 289 Mont. 255, 961 P.2d 100; *Day v. Payne*, 280 Mont. 273, 929 P.2d 864 (1996). Neither may *Amici* raise an issue on appeal that was not raised below. ***State ex rel.***

Bennett v. Bonner, 123 Mont. 414, 214 P.2d 747 (1950); **State ex rel. Kvaalen v. Graybill**, 156 Mont. 190, 496 P.2d 1127 (1972).

As this Court, as well as other courts across the country have recognized, "...*amicus curiae* is not a party to the action,-- he has no control over the proceedings,-- he must take the case as he finds it....*amicus* may not raise new issues which have not been raised by the parties and cannot assume the functions of parties nor create, extend or enlarge issues." **Weber v. Interbel Telephone Cooperative, Inc.**, Mont. Sup. Ct. Cause No. 02-517 (Order dated April 8, 2003, p. 2 (citations omitted)) **(Tab A)**.

2. The Constitutional Challenge by Plains Grains was Untimely.

An objection has been filed by Southern Montana and the Urquharts to Plains Grains' Notice of Constitutional Challenge. The Notice is untimely, therefore, neither Plains Grains nor any amici who desire to appear on their behalf are permitted to raise or argue any constitutional issues.

As discussed in the objection filed, Rule 27, M.R.App.P., requires that written notice "...**must be given no later than eleven days from the date that the notice of appeal or notice of cross appeal is filed or the date of the filing of an original proceeding in the Supreme Court.**" *Id.* (emphasis added). Plains Grains filed their Notice of Constitutional Question on September 11, 2009, well beyond eleven days from both the filing of the Notice of Appeal (filed June 1, 2009) and the Notice of Cross Appeal (filed June 11, 2009). The Notice of Cross Appeal gave notice to Plains Grains that Southern Montana was cross appealing from the decision of the District Court on the issue of denial of the Motion to Dismiss on the grounds of mootness.

The District Court raised in its Order (dated November 28, 2008), *sua sponte*, a

constitutional argument that requiring a bond to stay a decision may interfere with constitutional rights. Plains Grains had actual knowledge of the constitutional issue raised by the District Court and of the cross appeal of the District Court's ruling but failed to give timely notice of the constitutional challenge. This Court has ruled that the failure to timely serve notice of a constitutional challenge precludes this Court from reaching the issue. ***Haider v. Frances Mahon Deaconess Hospital***, 2008 MT 32, 298 Mont. 203, 994 P.2d 1121; see also ***Boettcher v. Montana Guaranty Fund***, 2006 MT 127, 332 Mont. 279, 140 P.3d 474.

Even though the District Court commented in its Order that requiring a bond may affect access to courts, Plains Grains never sought a stay of the rezoning decision and the issue of a bond and its impact on access to the courts ***was never raised, briefed or argued below***. The Motion should also be denied upon this ground.

3. The Motion is Untimely.

Northern Plains filed their Motion for Leave to File *Amici Curiae* Briefs on September 11, 2009, requesting leave to file a brief in support of Plains Grains, on or before September 28, 2009. The motion is untimely and should be denied.

Plains Grains filed this appeal on June 1, 2009. The briefing schedule was set by order of this Court dated July 17, 2009. On August 17, 2009, Plains Grains filed their principle brief. On August 25, 2009, Southern Montana filed its Motion to Dismiss on Grounds of Mootness and supporting brief.

"The Court will deny a motion for leave to submit an *Amicus Curiae* brief that is filed after the normal briefing cycle set for the party to be supported, where the *amici* failed to show the requisite extraordinary cause for leave to file their brief." 4 Am.Jur.2d

Amicus Curiae §3. The Supreme Court has “consistently” followed this rule: “This Court has consistently declined to grant motions for leave to appear as *amicus curiae* which are filed late in the proceedings, after the briefs of the parties have been tendered to the Court, absent extraordinary circumstances.” **Mont. Petroleum Tank Release Comp. Bd. v. Fed. Servs. Ins. Co.**, Mont. Sup. Ct. Cause No. DA 06-0837 (Order dated July 18, 2007) (**Tab B**).

In their request and supporting brief, Amici have not presented any reasons that would constitute “extraordinary circumstances” for granting leave to appear in the midst of the briefing of the Motion to Dismiss. In addition, Plains Grains, which supports this Motion, previously moved this Court to expedite the appeal. The present untimely Motion, like the other untimely Motion for leave to appear *amici* supported by Plains Grains, is contrary to its request to expedite the appeal.

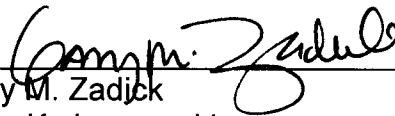
Finally, without conceding that the constitutional issue is properly before the Court, the same argument will be made by Plains Grains, which includes MEIC. Therefore, the interests of Northern Plains sought to be heard as *amici* will be represented in this appeal.

CONCLUSION

For the reasons stated, the Motion should be denied.

DATED this 16th day of September, 2009.

UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.

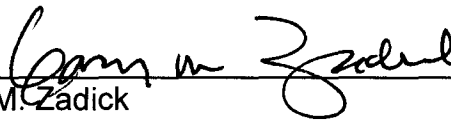
By: 

Gary M. Zadick
Mary K. Jaraczski
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Attorneys for Appellees/Cross-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is printed with a proportionately spaced Times New Roman test typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is not more than 1250 words, excluding certificate of service and certificate of compliance.

DATED this 16th day of September, 2009.



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Attorneys for Appellees/Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was duly served upon the respective attorneys for each of the parties entitled to service by depositing a copy in the United States mails at Great Falls, Montana, enclosed in a sealed envelope with first class postage prepaid thereon and addressed as follows:

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DATED this 16 day of September, 2009.



UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 02-517

FILED

APR 08 2003

Ed Smith
CLERK OF SUPREME COURT
STATE OF MONTANA

FREDERICK WEBER and MOOSEWEB CORPORATION,

Plaintiffs and Appellants,

v.

INTERBEL TELEPHONE COOPERATIVE, INC.,

Defendant and Respondent.

ORDER

Before the Court is Appellants' (Mooseweb) Motion to Strike Portions of *Amici Curiae* Briefs. Mooseweb argues that *Amici* have included in their briefs new factual material that is not a part of the record on appeal in this case. Specifically, Mooseweb argues that from the *amicus* brief of Mid-Rivers Telephone Cooperative, Inc., we should strike: lines 9-19, page 5; lines 1-2, page 6; lines 3-19, page 13; all of page 14; all of page 15; lines 1-9 and 13-19, page 16; and lines 1-3, page 17. Mooseweb also argues that from the *amicus* brief of 3 Rivers Telephone Cooperative, Inc., et al, we should strike: lines 3-9, page 1; lines 9-14, page 2; lines 8-15, page 3; lines 1-6 and 16-19, page 4; lines 1-5, page 5; and lines 4-6, page 8.

Mooseweb first cites to various cases in which we have held that briefs on appeal are limited to the record on appeal and cannot introduce extraneous or new matters which are not part of the record below. *See, e.g., Frank v. Harding*, 1998 MT 215, ¶ 7, 290 Mont. 448, ¶ 7, 965 P.2d 254, ¶ 7. *Amici* object, arguing that since they are not parties to the case, they

are not bound by the record on appeal, and are, therefore, not bound by the *Frank* line of cases. Amici support their position by citing to case law defining the role of *amici* in court proceedings--as friends of the court--and to cases which condemn a *party's*, rather than *amici*, attempts to supplement the record with facts extraneous to the record.

Since this is an issue of first impression, Mooseweb, with leave of this Court, filed a reply brief. In an appendix to its brief Mooseweb cites nine reported cases¹ which hold *amicus* briefs may not present new evidence or factual materials. Additionally, Mooseweb cites to *State ex rel. Bennett v. Bonner* (1950), 123 Mont. 414, 421, 214 P.2d 747, 751, a case also relied upon by *Amici*, in which this Court stated that while *amicus* may inform the court as to facts or situations that may have escaped consideration or remind the court of a legal matter which has escaped its notice, nonetheless, "[a]n amicus curiae is not a party to the action,--he has no control over the proceedings,--he must take the case as he finds it."

Moreover, Mooseweb cites to other Montana cases in which we have stated that *amicus* may not raise new issues which have not been raised by the parties and cannot

¹ The cases cited are: *Bouterie v. Crane* (La. Ct. App. 1992), 604 So.2d 1051, 1052 reversed on other grounds in (La. 1993), 616 So.2d 657; *Gandee v. Glaser* (S.D. Ohio 1992), 785 F. Supp. 684, 686; *Harjo v. Pro-Football, Inc.* (Trademark Trial & App. Bd., 1998), 45 U.S.P.Q. 2d 1789; *High Sierra Hikers Ass'n v. Powell* (N.D. Cal. 2001), 150 F. Supp. 2d 1023, 1045; *Metcalf v. Daley* (9th Cir. 2000), 214 F.3d 1135, 1141, n. 1; *Petition of Oskar Tiedemann & Co.* (3d Cir. 1961), 289 F.2d 237, 240, n. 5; *Stanley v. City of Independence* (Mo. 1999), 995 S.W.2d 485, 488, n. 2; *United States Fidelity & Guaranty Co. v. Victory Land Co.* (La. Ct. App. 1982), 410 So.2d 359, 361; *Wiggins Bros., Inc. v. Department of Energy* (Temp. Emer. Ct. App. 1981), 667 F.2d 77, 83.

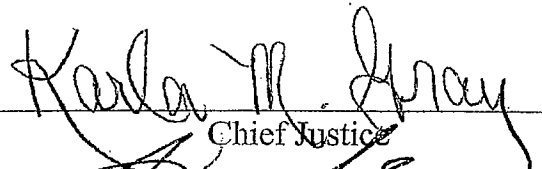
assume the functions of parties nor create, extend or enlarge issues.²


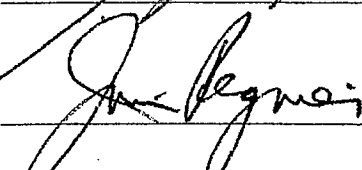
Based on the briefing, we conclude that Mooseweb's position is supported by the law and that the position of *Amici* is not. Therefore,

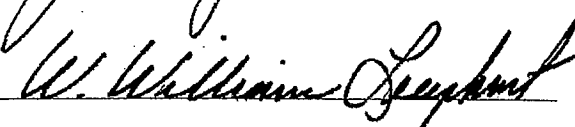
IT IS ORDERED that Mooseweb's motion to strike is GRANTED. The language from the briefs of *Amici* aforementioned is STRICKEN and shall not be argued or considered for any purpose in this appeal.

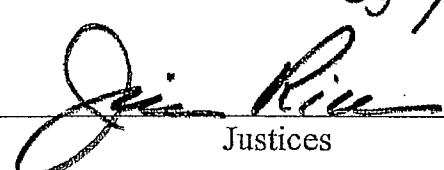
IT IS FURTHER ORDERED that the Clerk of this Court give notice of this order by mail to counsel of record for the parties and *Amici*.

Dated this 8th day of April, 2003.


Chief Justice




Justices

² The cases cited include: *State ex rel. Bennett v. Bonner* (1950), 123 Mont. 414, 421, 214 P.2d 747, 751; *Mountain States Ins. Co. v. State* (1985), 218 Mont. 365, 370, 708 P.2d 564, 567; *Montana Wildlife Fed'n v. Sager* (1980), 190 Mont. 247, 265, 620 P.2d 1189, 1200; and *State ex rel. Dept. of Health & Env'tl. Sciences v. Lasorte* (1979), 182 Mont. 267, 596 P.2d 477. See also *Cellnet Communications v. FCC* (6th Cir. 1998), 149 F.3d 429, 443.

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 06-0837

MONTANA PETROLEUM TANK
RELEASE COMPENSATION BOARD,

Plaintiff and Appellant,

v.

FEDERATED SERVICES INSURANCE
COMPANY, MOUNTAIN WEST FARM
BUREAU MUTUAL INSURANCE
COMPANY, NATIONAL FARMER'S
UNION PROPERTY AND CASUALTY
INSURANCE COMPANY, and
MUTUAL SERVICE CASUALTY
INSURANCE COMPANY, A MUTUAL
SERVICE INSURANCE COMPANY,

Defendants and Respondents.

FILED

JUL 18 2007

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

ORDER

This matter is before us upon the motion of the State Auditor and Commissioner of Insurance John Morrison (hereinafter "the Commissioner") for leave to appear amicus curiae. The Commissioner represents in his motion that he just recently became aware of the pendency of this matter. He asserts his belief that this Court did not fully appreciate the effect of its holding in *Petroleum Tank Release v. Capital Indem.*, 2006 MT 133, 332 Mont. 252, 137 P.3d 522, with respect to the date upon which a statute of limitations for commencement of an indemnity action begins to run, and seeks to argue for reconsideration of this Court's holding in the *Capital Indemnity* case. The Commissioner represents that counsel for Appellant Montana Petroleum Tank Release Compensation Board ("the Board") has no objection to his motion to appear as amicus curiae.

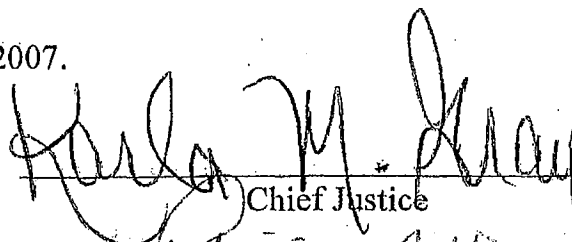
The Respondents have filed a consolidated memorandum in opposition to the Commissioner's motion to appear as amicus curiae, arguing that the State of Montana is already represented in these appeals by virtue of the presence of the Board as a party, and that the Commissioner has not identified an interest in these appeals separate from the interest of the Board. The Respondents further argue that the timing of the Commissioner's motion alone justifies a denial of his request, in light of the fact that they have already filed their consolidated answer brief in this matter, and would be deprived of the opportunity to address the arguments raised by the Commissioner in his amicus curiae brief.


This Court has consistently declined to grant motions for leave to appear as amicus curiae which are filed late in the proceedings, after the briefs of the parties have been tendered to the Court, absent extraordinary circumstances. We conclude that extraordinary circumstances do not exist here, especially in light of the fact that the interests of the State of Montana are already represented by the Board. For this reason, and so as to obviate the necessity of additional briefing on the part of the parties to address the Commissioner's arguments,

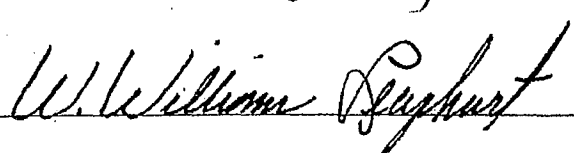
IT IS HEREBY ORDERED that the Commissioner's Motion for Leave to Appear Amicus Curiae herein is DENIED.

IT IS FURTHER ORDERED that the Clerk of this Court serve true copies of this Order to all counsel of record, and upon John Morrison as State Auditor and Commissioner of Insurance.

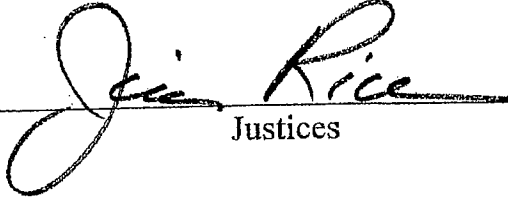
DATED this 18th day of July, 2007.



Paula M. Gray
Chief Justice


Patricia Catter


W. William Rughart



Justices